Employee Stand Downs and the Importance of Fairness

29 July 2020

Much of the commentary on employers' stand down rights in the current pandemic has focused on the "JobKeeper enabling directions" introduced into the *Fair Work Act 2009* (Cth) (**FW Act**) earlier this year. This makes sense if you consider the sheer number of employers whom are currently participating in the JobKeeper scheme and therefore entitled to issue these directions which are, by design, more *employer-friendly* than the general right of stand down under section 524 of the FW Act.

However, with the Federal Government's recent announcement regarding changes to be made to the JobKeeper scheme, an obvious concern of many employers is what will happen if they are no longer eligible to participate in the Scheme post September. While the legislative changes to the scheme and the FW Act are yet to be announced, employers may very well be forced to fall back on the general right of stand down under the FW Act.

The recent matter of *Mr Ryan La Plume v Thomas Foods International Pty Limited T/A Thomas Foods International* [2020] FWC 3690 serves as an important reminder of the need for employers to not only meet the pre-conditions to this general right of stand down, but to also ensure that principles of fairness are taken into account when exercising this right.

Ryan La Plume was employed by Thomas Foods International Pty Ltd (**Thomas Foods**) in 2015 as a full-time export documentation clerk. Thomas Foods is part of the Thomas Foods group, a national meat processing and wholesale business based in Adelaide, South Australia with processing facilities in multiple states supplying both national and global export markets. Thomas Foods is the employer of the group's head office staff.

The Government restrictions imposed in response to COVID-19 had a significant effect on the export markets serviced by Thomas Foods. The impact on the Thomas Foods group was material, and steps were taken to protect the group's commercial interests. The decision was eventually made by Thomas Foods to stand down Mr La Plume indefinitely without pay. Mr La Plume was notified of this decision on 28 April 2020, with his stand down taking effect from 4 May 2020. At the time, Mr La Plume was one of four members of Thomas Foods' export documentation team, which consisted of his immediate manager and two other clerks.

It is important to note that unlike the other entities within the group which operated the various processing facilities, Thomas Foods was less significantly affected by COVID-19, such that it was not eligible to participate in the JobKeeper scheme. It is equally important to note that in private discussions between the parties following the commencement of these proceedings, it was agreed that Mr La Plume would be made redundant effective 25 June 2020. Deputy President Anderson was of the view that this decision did not affect Mr La Plume's standing to request the FWC deal with his dispute as to the lawfulness of the stand down direction.

The first issue to be dealt with was whether the pre-conditions to a stand down direction under section 524 of the FW Act were properly met. Namely, the FWC needed to determine whether Mr La Plume could not be "usefully employed" by Thomas Foods and that this was because of a "stoppage of work" for any cause for which Thomas Foods could not reasonably be held responsible.

Deputy President Anderson provided a useful summary what constitutes a "stoppage of work", having regard to recent case law on the issue:

> *"[49] … what constitutes a "stoppage of work" in section 524 should not be so broadly construed as to include a mere downturn in business activity nor be so narrowly applied as to require the entire cessation of business activity. The statutory phrase is a stoppage of work, not a stoppage of the business. For there to be a stoppage of work some defined business activity with respect to which work is performed needs to cease, but not the cessation of business activity entirely…*
>
> *[50] Similarly, an employee in those areas may not be able to be usefully employed even though other employees are able to continue working."*

Applying this to the situation which Thomas Foods found itself in, Deputy President Anderson determined that there was no "stoppage of work" even though Thomas Foods' export documentation team experienced a downturn in overall work. The work of the export documentation team continued and although the reduced workload justified reducing the export documentation team members' hours of work, it could not be said that Mr La Plume could not have been employed to do some of that work.

Deputy President Anderson then considered the issue of fairness as required under section 526(4) of the FW Act and found that these fairness considerations "cut both ways." That is, it was fair for Thomas Foods to reduce working hours in the export documentation team to mitigate against the effects of COVID-19. However, it was not fair for Thomas Foods impose the whole burden of the reduction in hours on one full-time employee, Mr La Plume, whilst retaining full-time employment amongst other members of the export documentation team. This unfairness was aggrandised by the fact Mr La Plume was a longer serving employee than some others and had a low annual leave balance.

Deputy President Anderson concluded that a fair approach would have been for Thomas Foods to spread out the reduction of hours of work amongst other comparable employees in the export documentation team, not singularly to Mr La Plume.

Having regard to the above, it was decided that Mr La Plume's stand down was not consistent with the FW Act. Thomas Foods was ordered to pay Mr La Plume an amount equivalent to what he was entitled to earn during his stand down period, reduced by what would have been a fair reduction in his hours of work during that period (i.e. if the reduction was apportioned amongst the other employees and Mr La Plume had used his available leave balance).

While the future remains uncertain, it is becoming increasingly clear that in the eyes of the FWC and the courts, employers have now had more than enough time to not only understand whether and to what extent COVID-19 will affect their business, but to also have properly thought out contingency plans in place. The "drastic times call for drastic measures" approach is less likely to pass as time goes on and any neglect for the principles of fairness will be targeted.

Martin O'Connor | Partner
D +61 2 8915 1027
E martin.oconnor@addisons.com

Brandon Chakty | Solicitor
D +61 2 8915 0124
E Brandon.chakty@addisons.com

Level 12, 60 Carrington Street, Sydney, NSW 2000, Australia
addisons.com | **LinkedIn**

Level 12, 60 Carrington Street
Sydney NSW 2000 Australia

ABN 55 365 334 124
Telephone +61 2 8915 1000

mail@addisons.com
www.addisons.com